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DISTRICT COURT OF GUAM

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MARY L.M. MORAN  
CLERK OF COURT

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**Attorneys for Respondents**

**IN THE DISTRICT COURT OF GUAM  
HAGÁTÑA, GUAM**

JULIE BABAUTA SANTOS, individually and  
on behalf of all those similarly situated,

Petitioner,

vs.

FELIX P. CAMACHO, Governor of Guam;  
ART ILAGAN, Director of Department of  
Revenue and Taxation; LOURDES M.  
PEREZ, Director of Department of  
Administration; DOUGLAS B. MOYLAN,  
Attorney General of Guam; and  
GOVERNMENT OF GUAM,

Respondents.

Civil Case No. 04-00006

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
ATTORNEY GENERAL'S MOTION TO  
AMEND MARCH 2, 2005 ORDER  
DENYING RECONSIDERATION OF  
FEBRUARY 9, 2005 ORDER TO  
CERTIFY INTERLOCUTORY APPEAL  
TO THE COURT OF APPEALS FOR THE  
NINTH CIRCUIT**

PURSUANT to 28 U.S.C. §1292(b) and Rule 5(a)(3) of the Federal Rules of Appellate Procedure, the Attorney General of Guam submits the following Memorandum of Points and Authorities in Support of its motion to amend the Court's March 2, 2005 Order Denying Reconsideration of the Court's February 9, 2005 Order to certify an interlocutory appeal by the Attorney General to the United States Court of Appeals for the Ninth Circuit.

**ORIGINAL**

1 The Attorney General respectfully submits that (1) the “order involves a controlling question  
2 of law”; (2) there is “substantial ground for difference of opinion”; and (3) “an immediate appeal  
3 from the order may materially advance the ultimate termination of the litigation.” *See* 28 U.S.C. §  
4 1292(b).

5 Specifically, the Attorney General moves the Court to certify an immediate appeal of the  
6 following question:

7  
8 Whether, in an action filed in the District Court of Guam for  
9 the “for recovery or collection of taxes,” 48 U.S.C. § 1421i(h), the  
10 Attorney General’s designation as “Chief Legal Officer of the  
11 Government of Guam,” 48 U.S.C. § 1421g(d)(1), precludes the  
12 Governor and his representatives from appearing before the Court  
13 through separate counsel without the Attorney General’s consent;  
14 or, in the alternative, whether the Organic Act of Guam, specifically  
15 48 U.S.C. § 1421i(c), which provides that “[t]he administration and  
16 enforcement of the Guam Territorial Income Tax shall be performed  
17 by or under the supervision of the Governor...(either directly, or  
18 indirectly by one or more redelegations of authority)....” authorizes  
19 the Governor and his representatives, to appear before this Court  
20 through counsel other than the Attorney General and Chief Legal  
21 Officer of the Government of Guam, *see* 48 U.S.C. § 1421g(d)(1).

## 22 DISCUSSION

23 The closest analogy to what this Court has effectively done in authorizing the Governor and  
24 his representatives to retain their own counsel over the objection of the Attorney General is  
25 disqualify the Attorney General, and “Chief Legal Officer of the Government of Guam,” 48 U.S.C.  
§ 1421g(d)(1), from representing his own clients. Ordinarily, an order disqualifying counsel is not  
an appealable order as of right. *In re: Grand Jury Investigation*, 182 F.3d 668, 670 (9<sup>th</sup> Cir. 1999).  
And while the Attorney General has his doubts whether his disqualification from representing the  
Governor and his representatives would not satisfy the collateral order doctrine of *Cohen v.*  
*Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), given the Attorney General’s assertion that

1 the right to control this litigation and represent the respondents belongs not to the respondents, but  
2 to the Attorney General under the Organic Act, the Attorney General, indeed, the Public, need not  
3 wait until the conclusion of this litigation to appeal the issue. As noted by the United States  
4 Supreme Court:

5           Moreover, a rule precluding appeal pursuant to § 1291  
6 would not necessarily leave the client or the disqualified attorney  
7 without a remedy. As we noted in *Firestone [Tire & Rubber Co. v.*  
8 *Risjord*, 449 U.S. 368, 101 S.Ct. 669 (1981)], “a party may seek to  
9 have the question certified for interlocutory appellate review  
10 pursuant to 28 U.S.C. § 1292(b), ... and, in the exceptional  
11 circumstances for which it was designed, a writ of mandamus from  
12 the court of appeals might be available.” 449 U.S., at 378-379, n.  
13 13, 101 S.Ct., at 675-676, n. 13.

14 *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 435 (1985)

15           Because this is an extraordinary case involving the interpretation and application of the  
16 Organic Act of Guam, to an issue that is wholly collateral to the merits, but which may well be  
17 critical to its ultimate disposition, mandamus may very well be an appropriate remedy. However,  
18 the Attorney General respectfully submits that, in these circumstances, certification for interlocutory  
19 appeal is the more appropriate remedy. *Cf., Christenson v. United States District Court for the*  
20 *Central District of California*, 844 F.2d 694 n. 4 (9<sup>th</sup> Cir. 1988).

21           Interlocutory appeal by permission is governed by 28 U.S.C. § 1292(b) which provides in  
22 full:

23           When a district judge, in making in a civil action an order  
24 not otherwise appealable under this section, shall be of the opinion  
25 that such order involves a controlling question of law as to which  
there is substantial ground for difference of opinion and that an  
immediate appeal from the order may materially advance the  
ultimate termination of the litigation, he shall so state in writing in  
such order. The Court of Appeals which would have jurisdiction of  
an appeal of such action may thereupon, in its discretion, permit an  
appeal to be taken from such order, if application is made to it

1 within ten days after the entry of the order: Provided, however, That  
2 application for an appeal hereunder shall not stay proceedings in the  
3 district court unless the district judge or the Court of Appeals or a  
4 judge thereof shall so order.

5 The standards governing the grant or denial of interlocutory appeal by permission are well-  
6 defined. As noted by the District Court for the District Court of Oregon:

7 Pursuant to 28 USC § 1291, the federal courts of appeals  
8 postpone appellate review until after a final judgment has been  
9 entered by a district court. The Interlocutory Appeals Act, 28 USC §  
10 1292(b) ("§ 1292(b)"), provides a limited exception to this final  
11 judgment rule. It authorizes district courts to certify an order for  
12 interlocutory appeal only if: (1) the "order involves a controlling  
question of law;" (2) there is "substantial ground for difference of  
opinion;" and (3) "an immediate appeal from the order may  
materially advance the ultimate termination of the litigation." *Id.*; *In*  
*re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir1982), *aff'd*  
*sub nom Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190, 103  
S.Ct. 1173, 75 L.Ed.2d 425 (1983).

13 *Marsall v. City of Portland*, not reported in F.Supp.2d, 2004 WL 1774532 (D.Or. 2004) (Stewart,  
14 Magistrate J.) (footnote omitted).

15 Additionally, the Ninth Circuit has cautioned that § 1292(b)  
16 "is to be applied sparingly and only in exceptional circumstances."  
17 *United States v. Woodbury*, 263 F.2d 784, 799 n. 11 (9th Cir 1959).  
18 The legislative history makes clear that § 1292(b) is reserved for  
19 "extraordinary cases where decision of an interlocutory appeal  
20 might avoid protracted and expensive litigation," such as "antitrust  
and similar protracted cases." *United States Rubber Co. v. Wright*,  
359 F.2d 784, 785 (9th Cir1966), quoting S Rep No 2434 (1958),  
reprinted in 1958 USCCAN 5255, 5260.

21 *Id.* The criteria for interlocutory appeal are easily established in this case.

### 22 The Order Involves a Controlling Question of Law

23 A "question of law" is "controlling:" under § 1292(b) if resolving it  
24 on appeal could materially affect the outcome of litigation in the  
25 district court. *In re Cement Antitrust Litig.*, 673 F.2d at 1026. A  
"question of law" means a "pure question of law," not a mixed

1 question of law and fact or an application of law to a particular set  
2 of facts. *See Ahrenholz v. Board of Trustees of the Univ. of Illinois*,  
3 219 F.3d 674, 675-77 (7th Cir 2000). Writing for the Seventh  
4 Circuit, Chief Judge Posner explained that in the context of §  
5 1292(b), the term “question of law” means an abstract legal issue  
6 rather than an issue of whether summary judgment should be  
7 granted.” *Id* at 677 (emphasis added).

8  
9 *Marsall*, \*2.

10 In keeping with the congressional directive that § 1292(b)  
11 be applied narrowly and only in exceptional circumstances,  
12 numerous other federal courts also have interpreted the phrase  
13 “question of law” to mean a pure legal issue.

14  
15 *Id.*

16 The question presented here, namely: who controls this litigation, is, of course, a pure legal  
17 issue. Indeed, it is collateral to the merits of whether or not the petitioner and the putative class are  
18 entitled to the relief they seek in this Court. There are no facts in dispute. The question of who  
19 controls the litigation and who are the lawyers qualified to appear before the court is without  
20 question a controlling issue. It is the first question any court must ask. The first criteria – whether  
21 the order presents a controlling issue of law -- is thus easily established.

### 22 **There is Substantial Ground for Difference of Opinion**

23 To demonstrate “a substantial ground for difference of  
24 opinion” on a question for § 1292(b) certification, a party must  
25 show more than its own disagreement with a court's ruling. *See, e.g.,*  
*First Am. Corp. v. Al-Nahyan*, 948 F.Supp. 1107, 1116  
(D.D.C.1996) (“Mere disagreement, even if vehement, with a  
court’s ruling on a motion to dismiss does not establish a  
‘substantial ground for difference of opinion’ sufficient to satisfy the  
statutory requirements for an interlocutory appeal”). However, “in  
determining whether a substantial ground for difference of opinion  
truly exists, a district court must analyze the strength of the  
arguments in opposition to the challenged ruling.” *Ryan, Beck &*  
*Co., LLC*, 275 F Supp2d at 398 (internal quotation omitted). Indeed,  
an issue can be a controlling question of law for which there is a  
substantial ground for difference of opinion when it is “difficult and  
of first impression.” *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-*

1           *Gestione Motonave Achille Lauro in Amministrazione*  
2           *Straordinaria*, 921 F.2d 21, 25 (2nd Cir1990); *but see In re Flor*, 79  
3           F.3d 281, 284 (2nd Cir1996) (“[T]he mere presence of a disputed  
4           issue that is a question of first impression, standing alone, is  
5           insufficient to demonstrate a substantial ground for difference of  
6           opinion. Rather, [i]t is the duty of the district judge ... to analyze the  
            strength of the arguments in opposition to the challenged ruling  
            when deciding whether the issue for appeal is truly one on which  
            there is a substantial ground for dispute” (internal citations and  
            quotations omitted)).

7           *Marsall*, \*5 (editorial brackets and ellipses in original).

8           This is no mere disagreement, even vehement disagreement, with the Court’s ruling.  
9           Moreover, this is no mere dispute between adverse parties to the litigation, between plaintiff and  
10          defendant, or petitioner and respondent, as is true in the ordinary case, and even the usual  
11          disqualification cases. This dispute is within one set of the parties – the respondents – themselves, as  
12          to who their lawyer is and what legal policy decisions are to be made on their behalf.

13          The decision of this Court disqualifying the “Chief Legal Officer of the Government of  
14          Guam” from representing his own clients, as envisioned by Congress, and as evidenced by the  
15          substantial briefing in this case demonstrates a substantial grounds for a difference of opinion with  
16          respect to this dispute. This Court and the parties have already expended considerable time and  
17          resources in pursuit of a judicial resolution of this dispute. The arguments presented are by no  
18          means frivolous; and no party would presume to suggest otherwise.

19          This Court has been asked to ascertain Congressional intent, and to make inferences from  
20          Congressional silence; the Court has had to grapple with an intra-Organic conflict that will  
21          ultimately define the separation of powers within the Executive Branch of the Government of Guam  
22          in all future tax refund cases ever to be heard before this Court; and the Court has been favored with  
23

1 case law from numerous jurisdictions which present different answers to the question presented.  
2 The dispute is substantial.

3 **An Immediate Appeal from the Order May Materially Advance the**  
4 **Ultimate Termination of the Litigation.**

5 Unquestionably, an interlocutory order will materially advance the ultimate termination of this  
6 litigation. Indeed, the litigation has been materially delayed, and a settlement of this case disrupted  
7 because of this collateral dispute. If an interlocutory appeal is certified and the Attorney General  
8 ultimately prevails, the plaintiff class and anticipated objectors will only have attorney and one legal  
9 position for the whole of the Government of Guam to contend with. If an appeal is not certified,  
10 any progress made throughout the case – whether the petitioners prevail in whole or in part or not --  
11 will be held in abeyance pending final resolution by the Court of Appeals of what is actually a  
12 preliminary question: Who is the lawyer for the respondents and who controls the litigation? If the  
13 Attorney General is ultimately successful in his position, all the Court's and the parties' time and  
14 energies to-date will have been wasted.

15  
16 **This Case Presents Extraordinary Circumstances**

17 This case involves the construction of Congressional intent in amending Guam's  
18 Organic Act in 1998, establishing the Office of Attorney General, designated by Congress as the  
19 "Chief Legal Officer for the Government of Guam." 48 U.S.C. § 1421g(d)(1). It is no ordinary  
20 case wherein an attorney is disqualified because of an ethical or other conflict. It presents a  
21 possible conflict within the Organic Act itself with respect to the doctrine of separation of  
22 powers. The question presented directly impacts Guam's self-governance, as authorized only by  
23 Congress, and the allocation and delegation of powers, duties and responsibilities not merely  
24 *between* the three branches of government for the Territory of Guam – executive, judicial and  
25




1 legislative – but *within* the branches of government itself, namely, the executive branch. The  
2 Attorney General respectfully submits that the Court's order is contrary not only to  
3 Congressional intent in establishing the Office of Attorney General within the Organic Act  
4 independent of legislative and gubernatorial oversight and control, but undermines democratic  
5 principles of self-governance with respect to the People of Guam's choice of their Chief Legal  
6 Counsel for all the Government of Guam. For that reason, an interlocutory appeal is due to be  
7 certified.

### 8 9 CONCLUSION

10 Based upon the foregoing, the Attorney General respectfully moves the Court to amend its  
11 March 2, 2005 Order Denying Reconsideration of the Court's February 9, 2005 Order, and to certify  
12 the question presented for interlocutory appeal to the United States Court of Appeals for the Ninth  
13 Circuit.

14 Respectfully submitted,

15 OFFICE OF THE ATTORNEY GENERAL  
16 Douglas B. Moylan, Attorney General

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18 Robert M. Weinberg  
19 Assistant Attorney General  
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**CERTIFICATE OF SERVICE**

This is to certify that I have this day served counsel for the opposing party(ies) with a copy of the foregoing by hand delivery, or by first class properly addressed, to:

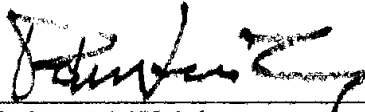
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this 11<sup>th</sup> day of March, 2005.

  
\_\_\_\_\_  
Robert M. Weinberg  
Assistant Attorney General